Supreme Court, U.S.
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No. 87-967

In the Supreme Court of the United States

OCTOBER TERM, 1987

AUDREY PRICE, ET AL., PETITIONERS

v.

SAMUEL PIERCE, SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioners' attempt to require the private respondents, who entered into contracts to provide subsidized housing under the pre-1981 version of Section 8(b)(2) of the United States Housing Act (42 U.S.C. 1437f(b)(2)), to rent all units potentially eligible for rent subsidies to persons who were eligible to receive such subsidies.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 823 F.2d 1114. The opinion and order of the district court (Pet. App. 16-66) is reported at 615 F. Supp. 173; its final judgment (Pet. App. 67-72) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1987, and a rehearing petition was denied on August 4, 1987 (Pet. App. 15). The petition for a writ of certiorari was filed on November 2, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1974, Congress enacted Section 8 of the United States Housing Act of 1937, 42 U.S.C. (& Supp. III)

1437f, "[f]or the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing" (42 U.S.C. (& Supp. III) 1437f(a)). This case involves Section 8(b)(2), 42 U.S.C. 1437f(b)(2), the provision relating to new or substantially rehabilitated housing, which was significantly amended in 1981 and repealed in 1983.

Between 1974 and 1983, the Secretary of Housing and Urban Development was authorized by Section 8(b)(2) to enter into contracts with private parties who intended to construct or substantially rehabilitate housing, or to enter into contracts with state agencies who would in turn contract with such developers. Under these Section 8(b)(2) contracts, the government agreed to subsidize the rent of lower-income families who would live in the new housing by paying the difference between the market rate and an amount the lower-income families would be required to contribute. Congress placed considerable reliance on private developers in the Section 8(b)(2) program because it concluded that previous public housing programs had "not operated well in many instances." H.R. Rep. 93-1114, 93d Cong., 2d Sess. 18 (1974). Congress also concluded that "[e]xperience has demonstrated that a cross-section of occupancy is an essential ingredient in creating economically viable housing as well as a healthy social environment." S. Rep. 93-693, 93d Cong., 2d Sess. 40 (1974). Accordingly, in Section 8(c)(5) Congress directed the Secretary to "give preference to applications for assistance involving not more than 20 per centum of the dwelling units in a project" (42 U.S.C. 1437f(c)(5)), although the Secretary or a state housing authority could enter into contracts authorizing assistance payments for a higher percentage of units.

Until 1981, Section 8 did not provide that landlords participating in the program had to rent all of the units eligi-

ble for rent subsidies to lower-income families. Of course, landlords "got no rent subsidies * * * on any of the apartments not rented to lower-income families" (Pet. App. 2). The Comptroller General nevertheless became concerned because many landlords were renting fewer than the maximum number of units authorized for subsidies to lower-income families, and issued a report in April 1981 (*id.* at 113-148) recommending modification of the Section 8 program. Congress responded by amending Section 8(b)(2) in October 1981 to provide that "[e]ach contract to make assistance payments for newly constructed or substantially rehabilitated housing assisted under this section *entered into after the date of enactment* of the Housing and Community Development Amendments of 1981 shall provide that during the term of the contract the owner shall make available for occupancy by families which are eligible for assistance under this section, at the time of their initial occupancy, the [full] number of units for which assistance is committed under the contract." Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 325(1), 95 Stat. 406 (emphasis added). The provision thus applied by its terms only to contracts entered into after its date of enactment; another provision of the 1981 amendments reiterated that the amendments "shall apply only with respect to contracts entered into on or after October 1, 1981" (§ 371(b), 95 Stat. 431).

Congress repealed Section 8(b)(2) in 1983. Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, § 209(a)(2), 97 Stat. 1183. Accordingly, since 1983 no new contracts have been entered into providing for rent subsidies for lower-income families in newly constructed or substantially rehabilitated housing. However, payments are still made pursuant to the program under contracts entered into before Section 8(b)(2) was repealed.

2. This case involves six developments in suburban Chicago. Between 1975 and 1978, the Illinois Housing Development Agency (IHDA), pursuant to Section 8(b)(2), entered into contracts with the private respondents, which were approved by the Secretary of the Department of Housing and Urban Development (HUD). The private respondents at first sought to have 20% of the units in each apartment complex eligible for rent subsidies, but the subsidy allocations were amended by 1978 to provide that up to 40% of the units in each of the six developments would be eligible for rent subsidies. See Pet. App. 34-35; Pet. 3 n.2; C.A. App. 169. By 1983, however, only about half of the units eligible for rent subsidies at the six developments had actually been rented to lower-income families, or approximately 20% of the total. The plaintiffs—six persons who had made inquiries about subsidized housing and a corporation that assists lower-income families in finding housing—then filed this suit. They sought " 'full utilization' of housing subsidies contractually allocated for use by low and moderate income families at the apartment complexes owned by the defendant Developers." Pet. App. 2-3, 16-17. The district court rejected their claims (*id.* at 16-72).

The court of appeals affirmed (Pet. App. 1-14). The court first concluded that petitioners were not third-party beneficiaries of the contracts entered into between the private respondents and IHDA that HUD had approved (*id.* at 9-11). The test for determining third-party beneficiary status, the court stated, is "whether the contracting parties intended the third party to have a right to sue in the event of breach" (*id.* at 9). The court noted that "to give each applicant for subsidized housing the status of a party to the contract would make almost every lower-income person in the United States a potential plaintiff"

and concluded that "[i]t is implausible that the developers, IHDA, or HUD ever intended to impose so novel and ill-defined a burden on themselves" (*id.* at 10).

The court nevertheless turned to the merits of petitioners' complaint and concluded that the private respondents were not required to rent all of the units eligible for rent subsidies to lower-income families (Pet. App. 11-14). The court noted that "[t]he 1974 statute says nothing about developers' having to rent to lower-income families all the apartments they have committed to rent to them" (*id.* at 11-12). It also noted that, pursuant to a regulation HUD promulgated "early on" (24 C.F.R. 883.327 (1976-1979)), which governs the contracts at issue, the government could penalize landlords who did not rent 80% of their eligible units to lower-income families. But the court concluded that the regulatory penalty represented "an exercise of HUD's power to make contracts implementing the statute rather than an interpretation of a statutory duty of developers to adhere to their contractual commitments" (Pet. App. 12). It was absolutely clear that no such statutory duty existed until the 1981 amendment, the court concluded, because of the "explicit denial of retroactive application" of that amendment (*id.* at 13).

Finally, the court rejected petitioners' argument that they had been deprived of property without due process. "Since the defendants did not violate the statute and the plaintiffs had no contract rights, the plaintiffs were not deprived of any entitlement, and hence of any property." Pet. App. 14.

ARGUMENT

The courts below correctly concluded that petitioners may not compel the private respondents fully to utilize all

of the Section 8 subsidies available to them. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals. Accordingly, further review is not warranted.

1. Petitioners primarily argue (Pet. 5-11) that the courts below erred in concluding that neither Section 8(b)(2), the applicable regulations, nor the contracts between the developers and IHDA, which HUD approved, require full utilization of the available rent subsidies. But there is no merit to that contention, since no "full utilization" requirement applied to contracts, such as the ones at issue, that were entered into between 1975 and 1978. In any event, petitioners lack third-party beneficiary status, and accordingly cannot sue to enforce the contracts.

a. As the court of appeals concluded (Pet. App. 11-12), the language of the statute, prior to its amendment in 1981, did not address the question whether developers had to rent all of the units that were eligible for subsidies to lower-income families. In 1981, Congress enacted such a requirement, but expressly made the full utilization requirement prospective only, as petitioners concede (Pet. 6). In these circumstances, it is clear that "the 1974 statute did not contain the inflexible requirement on which the plaintiffs rely" (Pet. App. 14).

The regulations governing the Section 8(b)(2) program and the terms of the contracts entered into between IDHA and the private respondents also make clear that there was no full utilization requirement at the time the contracts at issue were made. The contracts provided that up to 40% of the units in the developments involved in this case were eligible for subsidies; that figure was plainly a maximum (and not a requirement) since the contracts describe the 40% figure as "[t]he maximum amount of the commitment for housing assistance payments" (C.A. App. 108, 110) and nowhere require full utilization of available

subsidies. Through 1979, the applicable regulation provided that if the landlord failed "to have at least 80 percent of the Contract Units [*i.e.*, the units eligible for rent subsidies] leased or available for leasing by Eligible Families, the HFA [*i.e.*, the state housing agency], with the approval of HUD, may on 30 days notice reduce the number of Contract Units." 24 C.F.R. 883.327(a) (1979). The contracts at issue contained provisions (Pet. App. 173-174) that tracked the language of the regulation. Like the contracts, however, the regulation did not require full utilization. Thus, utilization decisions were left to landlords, subject only to the risk that the state agency (with HUD's approval) might reduce the maximum number of units eligible for subsidies if utilization fell below 80%.

Just as the 1981 statutory amendment makes clear that Section 8(b)(2) previously contained no full utilization requirement, amendments to the regulations subsequent to the date the contracts at issue were made (and inapplicable to those contracts) make clear that developers who entered into contracts between 1975 and 1978 could not be compelled to rent all of their eligible units to lower-income families. In 1980, a regulation was promulgated prohibiting utilization of fewer than 90% of the eligible units, and deeming failure to comply "a violation * * * and grounds for all available legal remedies, including specific performance." 24 C.F.R. 883.605(a) (1980). And, after the 1981 amendment of the statute, the regulation was changed to state that "an owner shall make available for occupancy by eligible families the total number of units for which assistance is committed under the Contract" and that "[f]ailure * * * to comply * * * is a violation * * * and grounds for all available legal remedies, including specific performance." 24 C.F.R. 883.605(a). In contrast, the regulation governing the contracts at issue, and the

terms of those contracts, did not require full utilization (or any level of utilization). Except for providing that the state agency may, with HUD's approval, reduce the number of units eligible for subsidies when utilization falls under 80%, neither the regulation nor the contracts provide any remedies—let alone specific performance—for failure fully to utilize available subsidies.[1]

Since there is no requirement that the developers involved in this case fully utilize the subsidies available to them and no remedy for underutilization (other than a reduction in the number of subsidized units available at the developments, a remedy petitioners do not desire), there is no basis for petitioners' complaint about HUD's "inexplicable inaction" and failure to exercise its "oversight responsibilities" (Pet. 6).[2] Therefore, as the court of

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[1] The court of appeals disagreed (Pet. App. 5) with the government's contention that the 40% subsidy allocation figure in the contracts was merely a maximum. But it agreed that the sole remedy for underutilization is reduction in the number of units eligible for subsidies and rejected petitioners' contention that specific performance is available to require the private respondents to rent all of their eligible units to lower-income families.

[2] Petitioners' contention (Pet. 11) that the court of appeals erred in concluding that the contracts at issue had been lawfully modified does not support their assertion that mandatory relief is warranted. The court of appeals found (see note 1, *supra*) that the contracts at one time required 40% occupancy by lower-income families, and stated that "IHDA and the developers * * * modified the contracts to reduce the percentage [of units eligible for subsidy] to 20 percent" (Pet. App. 5). The court also concluded that "since the contracts were lawfully modified, HUD cannot be faulted for having refused to enforce them according to their original tenor" (*id.* at 11). As petitioners observe (Pet. 11), the district court invalidated an express reduction made in five of the contracts in 1983 (Pet. App. 51-52) and HUD subsequently declined to approve that reduction (*id.* at 68-69). But we understand the court of appeals' reference to contractual modification to mean

appeals concluded, there is no need to "decide whether this case falls within any of the exceptions to the rule that agency inaction is inactionable. See *Heckler v. Chaney,* 470 U.S. 821 (1985)" (Pet. App. 11).[3]

b. Moreover, assuming arguendo that the contracts here mandated full (or 80%) utilization and were breached by the challenged underutilization, petitioners' contract-based claim was nonetheless properly rejected on a wholly independent ground, lack of third-party beneficiary status. As the court of appeals concluded (Pet. App. 9-11), petitioners are not parties to the contracts and they may sue to enforce their terms only if the parties so intended. *D'Amato* v. *Wisconsin Gas Co.,* 760 F.2d 1474, 1479 (7th

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only that the parties had modified their original understanding that 40% of the units were to be rented to lower-income families, and to provide instead that a lower utilization rate was authorized by IHDA. In any event, any error by the court of appeals was harmless, since, as it correctly concluded, the sole contractual remedy for underutilization here was IHDA's option to seek a subsidy reduction and, in addition, petitioners lack third-party beneficiary status and therefore may not challenge any underutilization.

[3] Nor is there merit to petitioners' complaints (Pet. 7) that a HUD handbook and statements by a HUD employee, Elmer Binford, show that the developers must fully utilize the subsidies available to them. The handbook petitioners cite (an excerpt of which is at Pet. App. 159-160) does not purport to authorize specific performance to require full utilization of subsidies. In any event, it was not promulgated through rulemaking (see 24 C.F.R. Pt. 10), and, accordingly, "is not a regulation" and "has no legal force." *Schweiker* v. *Hansen,* 450 U.S. 785, 789 (1981). The statements by Mr. Binford (Pet. App. 149-158) were apparently based on his failure to recognize that the contracts at issue are governed by the statute as drafted in 1974 and the pre-1980 regulations. His misunderstanding does not change the requirements of the applicable statute, regulations, and contracts. See *Heckler* v. *Community Health Services,* 467 U.S. 51, 63 (1984); *Brecker* v. *Queens B'nai B'rith Housing Devel. Fund Co.,* 607 F. Supp. 428, 440 (E.D.N.Y. 1985), aff'd, 798 F.2d 52 (2d Cir. 1986).

Cir. 1985); *Roberts* v. *Cameron-Brown Co.*, 556 F.2d 356, 362 (5th Cir. 1977); *Samuels* v. *District of Columbia,* 770 F.2d 184, 201 n.14 (D.C. Cir. 1985); Restatement (Second) of Contracts § 313 (1981). As the court further concluded, given that a "developer who signed a contract with IHDA would be buying potential legal trouble not only with the relative handful of lower-income families to which he might actually rent but with all the lower-income families in the region," and that "so wide a net of liability could make developers reluctant to participate in the program," it is "implausible" that the parties would want to allow petitioners to sue as third-party beneficiaries (Pet. App. 10). Petitioners fail to address the court of appeals' conclusion, which is plainly correct, that "the developers did not assume contractual liability to applicants" (*id.* at 11).[4]

2. Since neither the statute, the regulations, nor the contracts prohibited the private respondents from renting fewer than all of their eligible units to lower-income families or granted petitioners any right to force them fully to utilize available subsidies, there is no basis for petitioners' claim (Pet. 12-13) that they were denied due process. Due process "appl[ies] only to the deprivation of interests encompassed by the [Fifth or] Fourteenth Amendment's protection of liberty and property," and "the range of interests protected * * * is not infinite." *Board of Regents* v. *Roth,* 408 U.S. 564, 569-570 (1972). Petitioners allege that they have "a property interest in the Section 8 benefits and in assuring that defendants * * *

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[4] While the court of appeals dismissed petitioners' claims on the ground that, as applicants for housing, they are not authorized to sue to enforce the terms of the contract, petitioners err in asserting (Pet. 7) that their claims were "largely" rejected because they are " 'applicants' as opposed to 'tenants.' " The court of appeals fully addressed the merits of petitioners' argument (Pet. App. 11-14) and alternatively concluded that the statute does not mean what petitioners say it means.

utilize all Section 8 units allocated." Fourth Amended Complaint ¶ 85. But "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth,* 408 U.S. at 577; see also *Olim* v. *Wakinekona,* 461 U.S. 238, 250 (1983). Since there is no basis for petitioners' argument that the private respondents are required to rent all of the units eligible for subsidies to lower-income families, the court of appeals correctly concluded that petitioners "were not deprived of any entitlement, and hence of any property" (Pet. App. 14).

Contrary to petitioners' claim (Pet. 12), the court of appeals' conclusion that they were not deprived of property does not conflict with the Ninth Circuit's holding in *Ressler* v. *Pierce,* 692 F.2d 1212 (1982). In *Ressler* the court held that an applicant for subsidized housing was entitled, as part of the selection process, to various procedural rights, including notice of the reasons the applicant was rejected as a tenant and the right to a meeting to contest the rejection decision (*id.* at 1219). The court concluded that landlords have "only limited discretion in the Section 8 application and selection process," so that such procedural protections were warranted (*id.* at 1215). Petitioners do not seek notice and a hearing, but instead seek to require the private respondents fully to utilize all of the Section 8(b)(2) rent subsidies available to them, so the portion of *Ressler* on which petitioners rely is inapposite. Moreover, the court in *Ressler* rejected the plaintiffs' contention that HUD had abused its discretion by failing to require landlords fully to utilize their subsidies (692 F.2d

at 1222). Thus, the relevant portion of *Ressler* supports the decision below.[5]

Furthermore, since petitioners do not seek a procedural remedy, but instead seek to invalidate the pre-1981 statutory scheme under which landlords were not required fully to utilize subsidies, they are apparently invoking substantive due process. But phrasing their argument in terms of substantive due process adds nothing to their underlying contentions, because Congress's original decision not to require full utilization of subsidies was plainly rational. As the court of appeals noted, "Congress was evidently alert to the danger of 'tipping' " (Pet. App. 12). Indeed, as the court also noted (*id.* at 13), the state agency may have been on the "right track" in allowing the private respondents to use only about half of the subsidies for which they were eligible, so that approximately 20% of the units at their apartments were rented to lower-income families (the figure Congress favored in Section 8(c)(5)). And as the court further noted, it may be that "GAO's pressure for a higher percentage merely accelerated the program's demise" (Pet. App. 14).

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[5] The Ninth Circuit's decision in *Ressler* that procedural due process requires notice and a hearing during tenant selection is in tension with the Seventh Circuit's decision in *Eidson* v. *Pierce*, 745 F.2d 453, 454 (1983), where the court concluded that "neither the statute in question nor any regulations promulgated under it create a property interest in, or a legitimate claim of entitlement to, Section 8 benefits," so that procedural protections for applicants for subsidized rental units were not warranted. The court in *Eidson* expressly noted its disagreement with *Ressler* (*id.* at 460, 464). The Eighth Circuit followed *Eidson*, and noted its disagreement with *Ressler*, in *Hill* v. *Group Three Housing Development Corp.*, 799 F.2d 385, 389-393 (1986), in rejecting the plaintiffs' claim that, as applicants for subsidized housing, they had a property interest warranting procedural protections. This case, however, which does not involve a claim for procedural due process during tenant selection, does not present an opportunity to resolve the differences between *Ressler* and *Eidson* and *Hill*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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